

Reducing the Risk of Estate Litigation

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Brian Oard: Aloha. We are live from the Hawaii Tax Institute.

We are very fortunate to have a return interviewee from last year, Vivian Thoreen, who is a partner and the head litigation practice leader for Holland & Knight, based out of their Los Angeles office.

So, Vivian, part of your talk is you're talking about when to engage a health care professional to really assess capacity, undue influence or coercion.

Vivian Thoreen: There are two different ways in which a healthcare professional would be engaged. One is at the time that the estate plan is being prepared and before the client signs it. But it's also retrospectively after the client has passed away, when to engage a professional.

If an attorney has concerns about their client's capacity, regardless of the underlying reason for the question of capacity, then the attorney should consider hiring a health professional.

What's really important, though, about hiring the health care professional in my opinion is it's important to know exactly why you're retaining them. Is it for capacity-related reasons? Is it for undue influence reasons? Or is it both? Because sometimes, the health care professional is retained to assess capacity. But later, the issue becomes not capacity, but whether or not, and to what extent, mom was unduly influenced. And yet, it's not going to be reflected in their examination after the fact.

Some other factors that I would look to are make sure that the attorney is the person retaining the health care professional. There are privilege and work-product-related issues that would be important to preserve for this process. So that if and when they call someone like me, your file is intact and there are protections made to preserve the integrity of the communications and the report that's generated.

Alvina Lo: Are there any structures or planning that one could do ahead of time to mitigate the possibility, or to prevent the possibility, of pending litigation?

Vivian Thoreen: The short answer is, there's nothing you can do. If someone wants to litigate, they will litigate.

I've seen in my practice, however, that there are some clever estate planning strategies that some attorneys have used, and they include things like what I call serial amendments. So that if a parent, for example, is contemplating major changes to their estate plan, rather than do it in one fell swoop, do it slowly over time, over a number of documents and transition a little bit more slowly. Because at the end of the day, if there's a challenge and the child wants to get back to a point in time, they must overturn not just one, but perhaps three, or five, or ten amendments.

We talked about mental exams. That would be really good to have if litigation is anticipated, or in terms of preventing it, because the medical professional is acting in real time with the client. And they're in the best position to have historical information about the client's prior estate planning wishes. Their medical condition. Possibly relationships with other family members.

Brian Oard: Do they typically videotape those interviews?

Vivian Thoreen: I firmly believe, from a preventative perspective, that unless an attorney is well versed in filming and has their procedures down to a T, it should not be done. As a litigant, as an advocate for a client, I would love a videotaped execution. I would love it because, like this interview, there are multiple takes. There are prior versions, there are edits, and you would be entitled to all of that information.

Brian Oard Can you give us an example of some cases that you worked on with either bad planning that led to litigation or planning that prevented litigation?

Vivian Thoreen: So, an example of a plan that was done very poorly that led to litigation was the estate planning attorney relied too heavily on the child facilitating the communications. And I believe spent insufficient time with his client confirming independently that these proposed changes are, in fact, what his client wanted. And it sounds so basic. And it is. You have to confirm with your own client that this is what he or she wants. That's your job.

An example of a good estate plan would be where the estate planning attorney followed all the rules and said look, I would like to hear from you, that's great. But I really need to make sure that this plan is reflective of my client's intentions. And if there's a medical exam involved, for example, the timing of the medical exam is key. You want to have the medical exam as close in time to the moment before the client is going to sign their estate plan. How relevant is it going to be if there's a medical evaluation six months before the client signs the estate plan? It's not.

For a deeper conversation on the issues discussed in this video please reach out to:

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Note that estate planning strategies require individual consideration, and there is no assurance that any strategy will be successful.

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